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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC. 20554

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| In the Matter of | ) | |
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| Review of the Pioneer's Preference Rules | ) | ET Docket No. 93-266 |

# COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

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**COMMENTS**

Omnipoint Communications, Inc. ("Omnipoint") hereby submits its comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding (the "NPRM") concerning the impact of the Commission's recently granted competitive bidding authority on the Commission's pioneer's preference program.

## I. INTRODUCTION AND SUMMARY OF COMMENTS

Omnipoint strongly supports the Commission's pioneer's preference program. It has provided a much needed mechanism to encourage entrepreneurs to take risks and to give venture capital a reason to invest in spectrum based enterprises. In the particular case of personal communications services ("PCS"), the program has literally forged significant technical innovation and helped move PCS to the rulemaking stage on a heretofore unheard of timetable due in large part to the public discourse engendered by the incentive of obtaining a license through the award of a pioneer's preference.

The pioneer's preference program has thus far worked exceedingly well to promote innovation and launch new services. In

the process, the experimentation and the exchange of information among industry participants helped launch PCS. The public is the real winner, as access to PCS has become a reality.

Now, however, just as it can be demonstrated that the pioneer's preference program is working, the Commission in its NPRM has questioned whether the program continues "to be appropriate in an environment of competitive bidding" (NPRM at ¶ 11) under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 379 (the "1993 Budget Act"). In particular, the Commission has sought comment on two general issues, as well as several proposed administrative amendments.

The first major issue focuses on whether it is permissible or desirable to repeal the pioneer's preference program, diminish the award, or charge for the license prospectively in an auction environment. In that regard, the Commission asked:

> (i) whether the competitive bidding authority may have undermined the basis for the pioneer's preference rules (NPRM at ¶¶ 6-9);
>
> (ii) whether the Commission should charge for a license obtained through the pioneer's preference process (NPRM at ¶ 10);
>
> (iii) whether competitive bidding permits innovative parties to have a reasonable expectation of obtaining licenses (NPRM at ¶ 10);
>
> (iv) whether small businesses would be affected the same as other concerns by retention or repeal of the rules (NPRM at ¶ 10); and
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> (v) whether it would be appropriate to adopt alternatives to awarding pioneer's preferences outright (NPRM at ¶ 12).

The second major issue raised by the NPRM, primarily one of fairness and administrative authority, is whether any repeal or

amendment of the pioneer's preference rules should apply retroactively to existing tentative preference holders, including Omnipoint (NPRM at ¶ 19).

As discussed in detail below, the answer to each of these questions is a resounding "no." There is no legal or policy reason to abandon the Commission's pioneer's preference program or the regulatory treatment afforded to pioneers thereunder, particularly with reference to tentative preference holders. Both the program and the PCS tentative decisions had extensive notice and comment periods. As will be shown, the use of auctions to award licenses in no way changes the legal or substantive reasons for the program's existence of its public interest benefits.

Insofar as the Commission seeks guidance prospectively, in both the statutory language and legislative history of the 1993 Budget Act, Congress clearly and knowingly gave the "green light" to the Commission's pioneer's preference policy. There is good reason for this Congressional authorization -- pioneer's preferences sustain important communications policy goals that would otherwise be lost in an environment in which the licenses go to the deepest pockets. By preserving the FCC's authority to issue pioneer's preferences, the government recognized the value of American ingenuity, small businesses, and diversity from ownership that an auction process alone cannot.

Pioneer's preferences and spectrum auctions are not mutually exclusive. They go hand in hand for three primary reasons that benefit the public interest.

First, the public goal of encouraging innovation requires it. There is no incentive to innovate if the only reward is the right to bid against the largest companies in the world in order to be able to use your own innovations. In particular, an auction process alone largely eliminates the incentive for capital investment in innovation by smaller would-be service providers since auctions maintain the uncertainty resulting from licensing schemes where factors other than merit are the bases for license awards.

Second, the public goal of raising revenues through auctions (while prohibited from determining FCC policy) is greatly enhanced by the public disclosure of ideas which the pioneer's preference process brings out. The program offers the only incentive for public disclosure of the entrepreneurial and innovative work that will develop new services and add value to the underlying spectrum.

Third, the public goal of achieving diversity in the ownership of licenses and the provision of services means that other mechanisms besides auctions must be used to allocate licenses. As evidenced already in the auction NPRM and comments, set asides and other mechanisms to foster diversity are fraught with definitional and legal problems. The pioneer's preference policy is the only existing policy to help entrepreneurial firms.[1]

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[1]We must always remind ourselves that only nine companies control 90% of the "pops" in cellular. These nine companies bought the licenses which were initially allocated via lottery. If innovation is somehow automatically subsumed into the market price when licenses are sold, then why didn't we see new innovative companies obtain licenses in these "private auctions"? Is is possible that only the same nine companies had all the innovations

Insofar as the Commission seeks guidance on whether to change retroactively the rules with respect to the tentative winners, the Commission has already violated its own rules by failing to make final preference decision for PCS as part of the report and order in that proceeding. This completely unexpected action is causing significant damage for those of us who relied upon the Commission's rules and planned our corporate actions around the Commission's September 23, 1993 deadline. The detriment resulting from that action can only be remedied by an expedited determination to treat PCS pioneers under the current rules. It would be ethically unfair and legally insupportable to apply such major proposed changes in the rules as significant as those suggested by the Commission in this proceeding to tentative pioneer's preference holders. The legal issues are clear and will be discussed below, but the ethical issues are more fundamental.

When an entity holds out the promise of a particular award if the participants undertake risks and expend their efforts to fulfill certain achievements, it establishes a risk/return relationship which is fundamental to all decisions involving investment and sacrafice. Simply put, tentative pioneer's preference holders are entitled to be treated under the rules they complied with and the incentives which induced their efforts. Both the Commission and the industry have already benefitted from the

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in cellular during the past 10 years?

risk/return covenant which has been in place for two and a half years.

Further, the finalized preference holders should receive the spectrum allocations they petitioned for. There is no reason or record that justifies marginalizing the amount of spectrum to the preference winners relative to their petitions or tentative awards for 30 MHz.[2]

Most importantly, PCS pioneers decisions should be finalized in an extremely expedited manner as the current delays past the regulatory deadline completely undermine the purpose of the preference program of "reducing the delays and risks associated with the Commission's allocation and licensing processes."[3] The delay has also stunted all business decision-making and investment by the tentative pioneers.

## II. THE PIONEER'S PREFERENCE PROGRAM HAS SUCCESSFULLY CONTRIBUTED TO THE GOVERNMENT'S PLAN TO EXPEDITE THE PROMPT AND EFFICIENT DEVELOPMENT OF NEW SERVICES.

The pioneer's preference program spurred the technological debate that led, in record time, to innovative PCS work, capital investment, and the creation of a PCS industry in the United States. Without the pioneer's preference program in an auction environment, there would be a great disincentive to conduct an open

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[2]If the Commission determines that the compromise proposed by some that carving out the core BTA(s) within the 30MHz MTA is an acceptable solution, then Omnipoint would accept this as well.

[3]Establishment of Procedure to Provide a Preference, Report and Order, 6 FCC Rcd 3488 (1991) (the "Pioneer's Preference Report and Order").

discussion and debate on new technologies, and innovation would not flourish. This result would be inconsistent with the government's goals to promote the introduction of new technologies and to make them promptly available to the public.

The Commission bears the responsibility to implement the Communications Act of 1934, as amended (the "Communications Act"), where it is stated that:

> It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or other party . . . who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

47 U.S.C. § 157 (a).

On April 12, 1990, the Commission took a step forward in the implementation of this mandate by proposing a system of preferential licensing for applicants undertaking substantial innovative work designed to advance the establishment of a new service or technology.[4] The proposal was premised on the recognition that "[i]nnovators of new services must spend a considerable amount of time and money in order to develop these new services." The Commission clearly understood the "innovator's dilemma":

> when an innovator, especially a small entity, develops an idea for a new service, it cannot simply arrange for developmental funding and try its idea in the market. Rather, it must first request that the Commission allocate spectrum or change some technical standards,

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[4]In The Matter of Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Notice of Proposed Rule Making, 5 FCC Rcd 2766 (1990) (the "Pioneer's Preference NPRM").

thus making the idea public, and then compete with other parties for a license.[5]

This "Dilemma" is in no way removed simply because after the allocation is made licenses are awarded by auction.

Did the Commission's proposal for creating a pioneer's preference have a positive impact on experimentation? Consider that during the first fifteen months of the PCS industry's existence -- from January 1989 through March 1990 -- only five companies requested experimental licenses. However, after the Pioneer's Preference NPRM in April 1990, there were 104 experimental license requests in just 16 months. This level of experimentation was unprecedented.

As is evidenced by the attached chart, the explosion in experimental license request continued until the cutoff for pioneer's preference applications was announced. More importantly, all of the surges in experimental license requests occurred as a result of pioneer's preference announcements. Neither the PCS Policy Statement nor the PCS NPRM itself had a significant impact on experimental applications. Even if one were to argue that the vast majority of the experimental licensees contributed very little, the total amount of experimentation that did contribute to the process was unprecedented. Further, because with each subsequent pioneer's preference the FCC will signal that it does not award preferences casually, the frivolous applications will disappear.

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[5]Id. (emphasis added).

On October 8, 1992, when the Commission selected Omnipoint and two other parties as tentative grantees of pioneer's preferences for PCS[6] it recognized that the pioneer's preference program had achieved significant public benefit:

> This proceeding has sparked unprecedented interest in and exploration of new technologies and services by a wide variety of parties. A considerable number of parties have conducted substantial experimentation and assisted us in our deliberations to establish new personal communications services . . . .

Tentative Decision, 7 FCC Rcd at ¶ 1.

Unambiguously, the Commission acknowledged that the program played a significant role in promoting the experimentation required to develop the regulatory framework for PCS. It attracted diverse efforts and created an incentive for those parties to work in an open environment, where information, test results, and criticism were shared. By providing the expectation of a license for the service, the program created an incentive for capital investment and, above all, accelerated the introduction of PCS as a viable service. The program, if carefully administered, is an important tool in the government's efforts to make services like PCS widely and promptly available to the American public.

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[6]In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992) (the "Tentative Decision").

## III. THE PIONEER'S PREFERENCE PROGRAM IS UNAFFECTED BY THE COMMISSION'S COMPETITIVE BIDDING AUTHORITY.

The substantive reasons for maintaining the pioneers preference program were not changed when the FCC was authorized to use competitive bidding to award licenses. Further, from a legal and regulatory perspective, the answer to the Commission's first question in the NPRM is readily found in the 1993 Budget Act.

The pioneer's preference system is not inconsistent with the auction system. In fact, the 1993 Budget Act reinforces the Commission's pioneer's preference policies. The statute and its legislative history clearly indicate that, in enacting the 1993 Budget Act, Congress was aware of the Commission's prior decisions to reward qualified technology and service innovators through an alternative licensing scheme -- the pioneer's preference. Congress expressly sought to grandfather that authority. The public policy reasons supporting pioneer's preferences are just as compelling, perhaps even more so, in light of the competitive bidding process.

### A. Legislation Granting the Commission Competitive Bidding Authority Does Not Alter, But Rather Reinforces, the Commission's Ability to Award Licenses to Pioneer's Preference Holders.

In the 1993 Budget Act, Congress undertook a significant revision of the Communications Act, among other things, to grant the Commission the authority to issue radio spectrum licenses pursuant to competitive bidding procedures. 47 U.S.C. § 309(j). During the whole time the legislation was under consideration, the pioneer's preference program was in place and being implemented. Tentative grants to pioneers for PCS, little LEO and others were in

place. The final grant to Mtel took place after both the House and Senate versions of the auction legislation had been passed by their respective committees.

Congress was not only aware of the Commission's pioneer's preference policies at this time, but debated the merits and tradeoffs of pioneer's preferences for months. The Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce held a hearing on April 22, 1993 in which all but one of the speakers unequivocally supported the need to preserve the pioneer's preference program if auction legislation were passed. Congress clearly had the opportunity to disapprove of the policy. But instead, during the final conference between the House and the Senate, Congress chose to remove any doubt as to whether auctions altered the Commission's authority to grant pioneers preferences.

In this regard, the 1993 Budget Act states:

> Rules of Construction -- Nothing in this subsection, or in the use of competitive bidding, shall . . . be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology.

47 U.S.C. § 309(j)(6)(G). The Commission's pioneer's preference rules, which grant preferences in the licensing process to persons who establish that they have "developed the capabilities or possibilities of the technology or service or [have] brought them to a more advanced state," 47 C.F.R. § 1.402 (1992) unambiguously supported by the statutory language.

Nevertheless, if any doubt were to exist, the Conference Report on the legislation states that:

> The Conference Agreement adopts the House provisions with an amendment. The amendment includes three provisions from the Senate Amendment, including the provision of section 309(j)(5)(E) concerning the so-called "Pioneer's Preference."[7]

Thus, the first question in the NPRM (at ¶ 7) can be easily answered by reference to the 1993 Budget Act. The legislation does not undermine in any way the Commission's pioneer's preference program. In fact, it encourages its continuance. Congress expressly sought to grandfather the program and to preserve the full authority of the Commission to implement it. When the language of the statute is so clear and unambiguous, there is no need to resort to extraneous sources to ascertain the legislative will.[8]

The legislative history also confirms that more than mere "neutrality" was intended by Congress in its reference to the pioneer's preference rules. The history of the auction bill makes clear that the adoption of the pioneer's preference provision was very deliberate.

Originally, the House of Representatives and the Senate had approached the issue of pioneer's preferences from different points of view, neither of them adverse to the program. While the House auction provisions made no mention of pioneers or of "persons who make significant contributions to the development of a new

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[7] H.R. Rep. No. 213, 103rd Cong., 1st Sess. at 485 (1993).

[8] See Negonsott v. Samuels, 113 S.Ct. 1119, 1122-23 (1993) ("where [Congressional] will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive").

telecommunications service or technology," the original House legislation in proposed subsection 309(j)(3)(A) did direct the Commission to design an auction methodology that ensured "the development and rapid deployment of new technologies, products, and services for the benefit of the public." The legislation's sponsor, House Telecommunications Subcommittee Chairman Edward J. Markey, viewed it as favoring pioneer's preferences:

> This legislation also enables the FCC to continue to hold out the promise of a "pioneer's preference" for the truly genius who catapult technology to another level. In fact, some of that genius is what spawned the entire PCS revolution. Under this legislation tho~e truly genuine technology pioneers will be able to make a run for the roses and get a big payoff if they succeed. As we all know, that is a most powerful incentive, and that is why I think it is vital that we continue the overall thrust of the pioneer's preference program.[9]

The full Committee adopted Chairman Markey's legislation as an amendment in the nature of a substitute.[10]

The Senate, on the other hand, adopted the explicit language favoring the use of pioneer's preferences by clarifying that the auction legislation in no way undermined the policy. It was the Senate language that later became law. As the Senate Committee explained it:

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[9]Statement of Rep. Edward J. Markey at House Energy and Commerce Committee's Mark-up of Budget Reconciliation, Subtitle C (Licensing Improvement Act of 1993) (May 11, 1993).

[10]The only amendment to his legislation, which concerned promoting economic opportunity for businesses owned by members of minority groups and women, do not address detract from the pioneer's preference program.

> Consistent with the FCC's statutory obligation and its prior efforts in that regard, the Committee included language in this subsection which states that nothing prevents the FCC from awarding licenses to companies or individuals who make significant contributions to the development of a new telecommunications service or technology.[11]

In Conference, the House dropped its neutrality language, and agreed to the Senate's clear and unambiguous language supporting the Commission's pioneer's preference program. Moreover, this was done after days of discussions on the specifics of the pioneer's preference program and the fact that pioneers would be put on a separate licensing track from that of competitive bidding.

Thus, the Commission's concern at ¶ 9 of the NPRM with the House Report's neutrality on the pioneer's preference rules is unwarranted. That neutrality language was written months before the law was adopted and was later superseded by the unequivocal endorsement by Congress of the Commission's authority to implement the pioneer's preference program.[12]

Southwestern Bell's comment that "[i]f the lawmakers intended to exempt the pioneers from the obligation to pay auction fees, it

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[11]139 Cong. Rec. S.7913, 7949 (Daily ed. June 24, 1993) (statement of Sen. Inouye).

[12]The sequence of congressional consideration underscores that this endorsement was not the result of some 11th hour amendment, but rather that the Congress acted deliberately in passing this language. The House Committee's mark-up on May 11, 1993, signals completion of the first phase of the sequence, which continued with passage by the full House on May 27, 1993. The Senate Commerce Committee, which inserted the unequivocal endorsement of the pioneer's program in its version of the legislation, then completed its mark-up on June 15, 1993, and the full Senate passed the legislation on June 24, 1993. Shortly thereafter, the House and Senate conferees began their negotiations, which culminated weeks later in the filing of the conference report on August 4, 1993.

would have been an easy matter to say so explicitly,"[13] turns the facts on their head. The pioneer's preference program already existed and it was abundantly clear that it was on a separate licensing track since the innovators would be rewarded "by permitting the recipient of a pioneer's preference to file a license application without being subject to competing applications."[14] Had Congress wanted to charge the pioneers it would have had to instruct the Commission to find some methodology to do so, since prima facie under the 1993 Budget Act there is no auction fee for a license that, as a matter of basic qualifications, is not subject to mutually exclusive or competing applications. In fact, the only reason to use the Senate language which finally became law was to remove any ambiguity as to whether Congress understood that the Pioneer's Preference program was on a separate track.

Moreover, the notion of assessing a fee is completely different from holding an auction. The value of a PCS license to, for example, an AT&T, which can use the license to bypass the local access fees and drop billions of dollars to its bottom line, in no way indicates the value of a license to a start-up company like Omnipoint. Thus, the pioneer's preference licenses are on a separate licensing track for underlying substantive reasons.

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[13]Southwestern Bell Corporation, Letter re: Personal Communications Services and Pioneer Preference Issues at 2 (October 14, 1993).

[14]See Pioneer's Preference Report and Order.

In sum, Congress, after considerable deliberation, expressly chose to endorse the Commission's existing pioneer's preference program, and chose to do so precisely in the context of authorizing licensing through spectrum auctions. In simultaneously granting the Commission the authority to license radio spectrum through competitive bidding, Congress unquestionably intended to reinforce -- not alter -- the Commission's ability to grant pioneer's preferences on a separate track.

### B. Competitive Bidding Does Not Eliminate The Public Interest Basis For Pioneer's Preferences.

From a legal perspective, the Commission properly concluded (NPRM at 10) that the 1993 Budget Act does not direct it to apply competitive bidding to applications which are not mutually exclusive, such as pioneer's preference applications. Indeed, the 1993 Budget Act limits the Commission's authority to assign licenses through competitive bidding to mutually exclusive license applications:

> If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum . . . then the Commission shall have the authority . . . to grant such license or permit to a qualified applicant through the use of a system of competitive bidding . . . .

47 U.S.C. § 309(j)(1) (emphasis added). It is undisputed that pioneer's preference applications are not subject to mutually exclusive applications. 47 C.F.R. § 1.402(d). Therefore, the pioneer's preference rules operate as an alternative licensing mechanism and do not contradict even the most literal application of the 1993 Budget Act's competitive bidding

process.[15]

Only by re-inventing the pioneer's preference program to include in it the possibility of mutually exclusive applications and to re-shape completely the nature of the pioneer's award could the Commission place pioneer's preferences within the scope of its authority to use competitive bidding for awarding the pioneers a license. The public interest supports the existing pioneer's preference program and counsels against such a massive revision of a program that has so positively affected the deployment of PCS and other new services. The only possible reason to do so would be to derive revenues. Congress made clear, however, that in prescribing rules to promote investment in and rapid deployment of new technologies and services:

> the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding . . . .

47 U.S.C §§ 309(j)(4)(C) and (7)(A).

Southwestern Bell's contentious shot that pioneer's preferences applications are somehow "mutually exclusive applications"[16]

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[15]The 1993 Budget Act confirms that the Commission has authority to retain other licensing mechanisms. The legislation did not require competitive bidding for content based services, such as broadcasting and cable television, and restricted the Commission's authority to grant licenses through random selection only in those instances where "there is more than one application for any initial license or permit" (47 U.S.C. § 309(i)(1)(A)). The statute does not alter in any way the Commission's authority to establish the basic qualifications criteria for each class of licenses.

[16]Southwestern Bell Corporation, Letter re: Personal Communications Services and Pioneer Preference Issues (October 14, 1993).

completely misses the point. A pioneer becomes a licensee pursuant to a Commission Rule that which states that a pioneer's application "will not be subject to mutually exclusive applications." 47 C.F.R. 1.402(d).

The public policy interests underpinning the pioneer's preference rules are separate and distinct from the policies supporting competitive bidding. The policy reasons the Commission has enunciated in favor of pioneer's preferences are:

> (1) the public interest in encouraging new and innovative communications services . . .(serving) . . . communications goals that are independent of the patent laws;[17] and
>
> (2) the public interest in encouraging worldwide leadership in new communications technology for the benefit of American consumers in the competitive global marketplace.[18]

The continuing validity of each of these two public policy concerns even after the introduction of competitive bidding to PCS licensing is readily apparent.

**i. The "Innovator's Dilemma" Is Not Solved Through Competitive Bidding.**

Nothing about using auctions to allocate licenses solves the "Innovator's Dilemma." The next wave of entrepreneurs after PCS will still be required to petition the FCC for an allocation, disclose their ideas and innovations, and go through the lengthy and arduous process of NOIs, NPRMs, further NPRMs, and Reports and

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[17] Pioneer's Preference Report and Order, 6 FCC Rcd at ¶ 19. See also Tentative Decision at ¶ 42 (PCS pioneer's preference decisions serve the public interest by reducing the risks associated with Commission's licensing procedures.)

[18] Pioneer's Preference Report and Order, 6 FCC Rcd at ¶ 18.

Orders. The disclosure of those ideas and innovations will vitiate the ability of the innovator to benefit in an auction.

At best, even if someday the allocation procedure changes, auctions without pioneer's preferences will drive all innovation underground. This, like auctions themselves, will further benefit the largest companies because they do not have to disclose their ideas simply to raise capital. In an auction, the only way an innovator could obtain a license due to his innovation is if the innovation can be kept secret, and the innovator already has the capital on its own to outbid anyone else for the license.

The unintentional silencing of innovation would be an unfortunate outcome. PCS benefitted greatly by the public discourse surrounding the proposals and experimental reports of the would-be pioneers. For example, it cannot be forgotten that at the time the pioneer's preference program was enacted in May, 1991, many companies were filing reports and comments explaining how difficult if not impossible it would be to use the encumbered 1850-1990MHz band for PCS. It was only because of the potential to obtain a license through the pioneers preference policy that companies like Omnipoint and others began to implement the solutions which are taken for granted today.

As a result of those efforts, the Commission will not be auctioning off raw spectrum. Whatever PCS licenses are worth, they are worth far more today than four years ago, before the incentive of the pioneer's preference encouraged more than 100 companies to

experiment to try to solve the problems then facing the nascent PCS industry.

Congress recognized that awarding a tiny percentage of meaningful licenses to successful pioneers is what will encourage future entrepreneurs to come up with the proposals which will result in future revenue to the government through future auctions. The pioneer's preference incentive is the golden goose of spectrum auction revenues. In a world of auctions without pioneer's preferences, there is no incentive to propose that one's idea is highly valuable since that can only drive up the cost of obtaining a license to provide that service.

The program is four years old and beginning to be debugged. Recall that it was in parallel to the Commission's efforts with Congress to obtain auction authority that the pioneer's policy was proposed and adopted. The policy had a year of gestation before being formally proposed by the Commission. It had another year of comments and replies in which all but a handful of the 60 companies commenting enthusiastically endorsed the need for the program. The reasons given in those filings for the need had nothing to do with whether auctions were used to allocate licenses. Seven decisions have been made in five separate licensing dockets. The policy behind and the legality of the program have been considered and reconsidered. The Commission voted unanimously in support of the program on every occasion. It should be retained.

### ii. The National Interest in World Leadership In New Services Is Advanced By Encouraging Pioneers.

Pioneer's preferences also promote national interest goals of developing America's technology at a faster pace than might otherwise occur. As the Commission recognized, "[o]f greater concern is the possibility that as future pathbreaking new telecommunications technologies and services are introduced worldwide, American consumers may not have the early benefit of these technologies and services.[19] Pioneer's preferences offer innovators added incentive to invest in the American market and maintain U.S. industry leadership in competition for international markets.[20]

## C. The Public Interest In Pioneer's Preferences Is Not Undermined by Competitive Bidding.

The Commission is correct (NPRM at note 5) that, when a federal agency is authorized to act in the public interest, the agency may continue to apply its rules only insofar as the rules further the public interest. "Changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy."[21] But, this obligation arises only when the agency cannot demonstrate that a challenged policy continues to serve the public interest. In responding to this obligation the Commission, in its

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[19]Pioneer's Preference Report and Order, 6 FCC Rcd at ¶ 18

[20]As the Commission stated in its PCS Second Report and Order, at ¶ 18: "the development of PCS services will permit U.S. industry to develop services and technologies for international markets."

[21]Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992).

discretion, is free to change or to retain its current policy.[22] When subsequent legislative action eradicates the Commission's pre-existing public interest basis for a rule, the Commission must reconsider whether its continued application of the rule serves any public good. In this case, the enactment of the competitive bidding statute does not obligate the Commission to reconsider in any way its pioneer's preference rules. An alternative licensing procedure for certain classes of applicants that are truly distinct -- pioneers -- does not reflect a schism in the public policy objectives of PCS regulation. It merely reflects the Commission's obligation to find the public interest in each licensing decision:

> That an agency may discharge its responsibilities by promulgating rules of general application which, in overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases.... [A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.[23]

As discussed above, the pioneer's preference rules continue to serve public policy goals of encouraging innovative services and national leadership in the world market.

Pioneer's preference rules also implement several goals of the 1993 Budget Act.

The 1993 Budget Act directs the Commission to "ensur[e] that new and innovative technologies are readily accessible . . . by

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[22]Id. at 881-82.

[23]Waite Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).